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Environmental Law--Clearcutting in the National Forests: A Violation of the Organic Act of 1897

Charles F. Printz Jr.
West Virginia University College of Law

CASE COMMENT

ENVIRONMENTAL LAW—CLEARCUTTING IN THE NATIONAL FORESTS: A VIOLATION OF THE ORGANIC ACT OF 1897

In April, 1973, the United States Forest Service advertised three timber sales in the Monongahela National Forest—one of the largest mixed hardwood forests in the United States—located in the Allegheny mountains of West Virginia.[1] Forty percent of the more than one thousand acres of forest to be harvested was designated for clearcutting. The proposed timber sales contracts were in standard form and provided for the sale and cutting of trees, many of which were not dead, mature, or of large growth. The boundaries of the areas to be harvested were designated, but individual trees were not marked for cutting. The contracts required that all cut trees be removed, but past practices indicated that much of the cut timber would remain on the site.[2] Plaintiffs brought an action for declaratory judgment and injunctive relief against the Secretary of Agriculture and various Forest Service officials, claiming that the practice of clearcutting violated the Organic Act of 1897.[3] At the trial, cross-motions for summary judgment were made. *Held*, plaintiffs' motion granted. Continued clearcutting in the Monongahela National Forest was permanently enjoined. Strictly construing the statute, United States District Judge Robert Maxwell held that the requirements of the Organic

[1]Approximately 1077 acres of timber land in the Monongahela National Forest were advertised for sale by the Forest Service. A breakdown of the location of each sale within the Forest, the acreage involved and the portion of that acreage to be clearcut is as follows: (1) Middle Mountain North Sale (White Sulphur Range District), consisting of 186 acres, all of which was designated for clearcutting; (2) Snorting Lick Sale (Greenbrier Ranger District), consisting of some 446 acres, of which 126 acres were designated as clearcut units; (3) Music Run Sale (Gauley Ranger District), consisting of 445 acres, of which 116 acres were designated for clearcutting. The first two sales were advertised on April 18, 1973. The latter sale was advertised on April 20, 1973. Izaak Walton League of America, Inc. v. Butz, 367 F. Supp. 422, 427-28 (N.D.W. Va. 1973).

[2]*Id.* at 428.

[3]16 U.S.C. §§ 473-82, 551 (1971). Plaintiffs' allegations dealt basically with the provisions of sections 475 and 476. *See* notes 4 and 6 *infra*. The purpose of the Organic Act of 1897 was to curtail uncontrolled exploitation of the nation's timber resources by authorizing the President to establish national forests, which were to be administered by the Secretary of Agriculture in accordance with certain congressional directives set forth in the Act.

Act were set forth in "clear and unmistakable" language. The Act authorizes the sale of "dead, matured, or large growth . . . trees" and further stipulates that, as a precondition to sale, all such trees "shall be marked and designated." The Act also requires that all sold timber "shall be cut and removed."[4] Thus, the court concluded that the Forest Service clearcutting policy exceeded the powers conferred by Congress upon the Secretary of Agriculture for the management of national forests. *Izaak Walton League of America, Inc. v. Butz*, 367 F. Supp. 422 (N.D.W. Va. 1973).[5]

In the Organic Act of 1897, Congress provided for the establishment and maintenance of national forests and parklands.[6] The

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[4]The limitations on the Secretary of Agriculture's power in this area are found in 16 U.S.C. § 476 (1971), which reads in part:

> For the purposes of preserving the living and growing timber and promoting the younger growth on national forests, the Secretary of Agriculture, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the *dead, matured, or large growth of trees* found upon such national forests as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. . . . Such timber, before being sold, *shall be marked and designated, and shall be cut and removed* under the supervision of some person appointed for that purpose by the Secretary of Agriculture not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof . . . . [Emphasis added].

[5]Plaintiffs were the West Virginia Division of the Izaak Walton League of America, Inc., the Sierra Club, the Natural Resources Defense Council, Inc., the West Virginia Highlands Conservancy, and Forrest Armentrout, a West Virginia resident who utilizes recreational facilities in the Monongahela National Forest. Plaintiffs are conservation oriented and have been in the forefront in instituting environmental type actions for "the maintenance, protection and restoration of natural resources of the United States." 367 F. Supp. at 425. The defendants were Earl L. Butz, Secretary of Agriculture, John R. McGuire, Chief of the Forest Service, Jay H. Cravens, Regional Forester for Region 9 and Alfred H. Troutt, Forest Supervisor.

[6]The relevant portion of 16 U.S.C. § 475 (1971) states:

> [A]ll public lands that may hereafter be set aside and reserved as national forests . . . shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions . . . to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

Secretary of Agriculture was given overall responsibility for the administration of these areas "under such rules and regulations and in accordance with such general plans as may be . . . approved . . . ."[7] To implement the general directives of Congress, the Secretary was authorized to establish a subordinate agency to regulate, preserve and manage the public lands under his supervision.[8] The United States Forest Service was organized as an agency of the Department of Agriculture and soon became the Secretary's primary instrumentality for the execution of departmental forestry policies and the enforcement of departmental rules and regulations.

Although the press and conservationist groups have lauded the *Izaak Walton League* decision as an environmental victory of selection cutting over clearcutting,[9] the court failed to consider the relative merits of the two timber management practices. Instead, by applying principles of statutory construction and interpretation and gleaning the Congressional intent in enacting the Organic Act, the court halted all harvesting of timber in the Monongahela National Forest that does not comply with the specific requirements of the Act.[10]

In its statutory analysis of the Organic Act, the court outlined several legislative controls over the harvesting of timber from the public domain. First, although section 475 of the Organic Act establishes the national forests and sets forth broad and general purposes for their creation,[11] the court determined that the more specific requirements of section 476 took precedence over, con-

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[7]*Id.* § 471(b). General plans for the administration of national forests and parklands must be approved by the Secretary of Agriculture and the secretary of the department that administered the land before it became a national forest.

[8]*Id.* § 551, which states in part: "[The Secretary] may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction . . . ."

[9]*E.g.*, The Charleston Gazette, November 12, 1973, § B, at 1, col. 1.

[10]Nowhere in the opinion did the court overtly charge the Forest Service with mismanagement of the national forests, but Judge Maxwell did refer to the practices of the Service as "compromises of expressed legislative goals," "gravitations from congressional mandate," and "policies and practices . . . [which] do violence to the legislative language of the Organic Act." This language unquestionably intimates mismanagement.

[11]"No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . . ." 16 U.S.C. § 475 (1971).

trolled, and manifestly limited the general terms of the Act's initial section.[12] Thus, the Secretary of Agriculture, in managing the national forests, could sell dead, matured or large growth trees only for the express purpose of "preserving the living and growing timber and promoting the younger growth on national forests."[13]

Second, to counter the defendants' contention that the phrase "dead, matured or large growth of trees" in section 476 gave the Secretary complete discretion to cut *any* tree in the national forests, the court accorded those statutory words their usual and ordinary dictionary meanings.[14] It then concluded that those definitions could only be read as specifying three classes of tree conditions, from which the Secretary has the discretion of designating individual trees to be cut.[15]

Finally, section 476 further requires the Secretary to mark and designate the timber authorized for sale. The court construed the marking and designating of trees as two separate and distinct processes. The Secretary was first to designate a general area of timber land, and then mark the individual trees within that area which were to be cut.[16] This finding effectively stilled the defendants' contention that marking and designating involved the same process.[17] The court also noted that the Organic Act called for the

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[12]367 F. Supp. at 429.

[13]16 U.S.C. § 476 (1971). The statutory language appears in note 4 *supra*.

[14]Words of a statute are to be given their plain and ordinary meanings. Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459, 465 (1968); Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947); Addison v. Holly Hill Fruit Prods. Ass'n, 322 U.S. 607, 618 (1944).

[15]367 F. Supp. at 430.

[16]*Id.*

[17]In Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alas. 1971), several conservation associations and individuals, in a case similar to the *Isaak Walton League* case, sought to enjoin the sale of timber and the issuance of a patent to defendant timber company to process timber harvested in the North Tongass National Forest. Plaintiffs charged that the Forest Service had failed to mark the timber prior to sale or public auction, pursuant to 16 U.S.C. § 476, and that such a practice invited indiscriminate cutting. After weighing the arguments of the two parties, the court commented that "pre-sale marking of individual trees would be so onerous that only isolated sales on small tracts could be made." *Id.* at 121. The court then declared that the designation of blocks of timber every five years and other supervisory provisions, according to the contract between the Forest Service and the defendant, United States Plywood-Champion Papers, Inc., provided adequate protection against indiscriminate cutting and satisfied the purpose of the section. The action was dismissed because of laches and plaintiffs' failure to pursue administrative remedies. The court recognized that the contractual relationship between the Forest Service and the defendant timber company precluded the necessity of marking

removal of all cut trees from national forests. Because of the clarity of the statutory language, the court did not refer to legislative history, administrative proceedings or other extrinsic evidence.[18]

Closely scrutinizing the language of the Organic Act, the court reasoned that Congress intended to restrict severely the invasion of public lands and the exploitation of timber resources, both of which were prevalent during the late nineteenth century.[19] Legislative resolve has remained steadfast through the years; Congress has never retreated from its commitment. Against this background of congressional intent and the explicit requirements of the Organic Act, the court noted a deterioration in the quality of the management of the national forests—a "gradual accommodation to the outside pressures of industrial progress in productivity."[20]

The practices of the Forest Service developed with almost imperceptible changes in policy. Because it was easier, more efficient, and more economical, the Forest Service began to designate boundaries of areas where trees were to be cut without marking each individual tree as required by section 476. For the same reasons, the policyof cutting only dead, mature, or large growth trees soon languished, and all trees within the designated area were harvested. Furthermore, despite the section 476 requirement that all cut timber be removed from the national forest, increasing amounts of commercially undesirable felled timber were left be-

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individual trees before they were cut. The court, however, did imply that marking and designation of trees were separate and distinct actions.

[18]Where the meaning of words in a statute is plain, there is no need to resort to legislative history. Gemsco, Inc. v. Walling, 324 U.S. 244, 260 (1945); United States v. Missouri Pac. R.R., 278 U.S. 269, 278 (1929); Jopek v. New York Cent. R.R., 353 F.2d 778, 782 (3rd Cir. 1965).

[19]367 F. Supp. at 429.

[20]*Id.* at 432. Statistics on lumber sales from the Monongahela National Forest reflect private industry's increasingly heavy reliance upon national forest lands as a source of timber. The Forest Service was established in 1920 and was managed primarily by selection cutting until 1964, when clearcutting became a major timber harvesting practice. From 1920 to 1968-69, approximately 600 million board feet were harvested under contracts of sale in the Monongahela National Forest, but annual sales in the Forest reached approximately 35 million board feet in the early 1960's and since that time have increased by one third. Thus, in the decade of the 1960's alone, over one-half of the total amount of board feet of timber removed from the Forest from 1920 to 1969 was harvested. The effect of industrial pressures upon the timber resources in the national forest lands is obvious. FOREST SERVICE, UNITED STATES DEP'T OF AGRICULTURE, EVEN-AGE MANAGEMENT ON THE MONONGAHELA NATIONAL FOREST 2 (1970). FOREST SERVICE, UNITED STATES DEP'T OF AGRICULTURE, 50 YEAR HISTORY OF THE MONONGAHELA NATIONAL FOREST 41-42 (1970).

hind. These compromises of the legislative intent and statutory controls of the Organic Act culminated in the 1964 adoption of clearcutting by the Forest Service.[21]

The court did not categorically condemn the practice of clearcutting and endorse selection cutting. Rather, by statutory construction and interpretation, Judge Maxwell demonstrated that the challenged policies and practices of the Forest Service contradicted the statutory language of the Organic Act and frustrated the legislative intent in promulgating that statute. Clearcutting appears to be a tenable timber harvesting practice. Advances in technology and increased demand for timber have made clearcutting a scientifically and economically feasible forest management technique.[22] But, despite the many valid business, industrial, and scientific arguments in support of clearcutting, the court's decision was correct in light of the rules of statutory construction.

The limitations that section 476 imposes on the general grant of authority contained in section 475 are clear and unmistakable. Clearcutting and other practices which compromise the legislative intent and conflict with the statutory language are precluded. The court's decision was the only one that could be made in response to the issues and questions of law presented. Nevertheless, the legislative controls and safeguards in the Organic Act appear inconsistent with modern technology, and, should the court's ruling be upheld, they could have a profound and deleterious effect upon the lumber market. However, since it is not the province of the

[21]Clearcutting involves the designation of an area of trees by marking the outer boundary. All of the trees within that area are then cut. The merchantable timber is removed, but inferior trees that are felled are often left on the ground. FOREST SERVICE MANUAL 2471.2, 2442.6, 2451.23a, 2452.23a, 2453.23a, 2454.23-1. Variations of clearcutting include seed-tree cutting and shelterwood cutting. Seed-tree cutting resembles clearcutting, except that certain seed trees within the designated area are not logged until natural regeneration occurs. FOREST SERVICE MANUAL 2471.22-2, 2442.6. Shelterwood cutting is simply three-staged clearcutting. At first, dead, mature, or large growth trees are marked and cut within designated areas. Then, seed-tree cutting is practiced, and finally, the seed trees are removed. FOREST SERVICE MANUAL 2471.22-1, 2471.22-3. Other timber and harvest methods alleged to be violative of the Organic Act are not directly related to clearcutting. Intermediate cutting and improvement cutting are methods of thinning stands of timber. Trees are individually marked before cutting, but such marking is indiscriminate, and no preference is given to dead, mature, or large growth trees. FOREST SERVICE MANUAL 2471.3.

[22]367 F. Supp. at 432.

courts to legislate,[23] the district court's decision will undoubtedly be affirmed. Therefore, the timber interests and the Forest Service must seek relief in the form of remedial legislation.

Charles F. Printz, Jr.

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[23]Courts have no legislative authority and should avoid judicial legislation. Ebert v. Poston, 266 U.S. 548 (1925); Holdren v. Stratton, 198 U.S. 202 (1905); Keppel v. Tiffin Savs. Bank, 197 U.S. 356 (1905); Lewis v. United States, 92 U.S. 618 (1875); Thelusson v. Smith, 15 U.S. (2 Wheat.) 396 (1817).